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IN THE

Supreme Court of the United States

October Term, 1960.

No. 411

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 1568, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
Cross-Petitioner.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

No.

OCTOBER TERM, 1960.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
Cross-Petitioner.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Cross-Petitioner, Local 1566, International Longshoremen's Association, respectfully prays that a Writ of Certiorari issue to review that part of the decision of the United States Court of Appeals for the Third Circuit entered in the above entitled case sustaining the National Labor Relations Board wherein it ordered the Union to cease and desist from entering into or enforcing any agreement or practice of preferential hiring except as authorized by Section 8(a)(3) of the Act; from causing, or attempting to cause Maritime Ship Cleaning & Maintenance Company to refuse employment to complainants, Marvin Gould and Zack Page, or any other applicant, for non-membership in the Union in violation of Section 8(a)(2); and from restraining and coercing in any manner employees or applicants for employment in the exercise of their rights under Section 7 of the Act, except to the extent authorized by Section 8(a)(3); and further in sustaining the Board's order to make whole Gould and Page for any loss of pay resulting from the discrimination.

OPINION BELOW.

The opinion of the Court of Appeals (*Infra*, p. 1a) is reported in 46 LRRM 2073, — F. 2d — (3 Cir., 1960). The findings of fact, conclusions of law, and order of the Board are reported at 122 NLRB 967.

JURISDICTION.

The decree of the Court of Appeals (*Infra*, p. 10a) was entered on June 14, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Where a union security clause in a collective bargaining agreement between the union and its employer contains a deferral clause making the agreement valid on its face, can such clause thereafter be converted into an illegal hiring clause because of subsequent discriminatory practices on the part of the employer's foremen?

2. Can a union be held liable for the discriminatory practices of a foreman merely because of his membership in the union and without active participation on the part of the union?

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 et seq.) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(2).

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time

the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f), (g) (h), * * *

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

* * *

"Section 10. * * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *"

STATEMENT OF THE CASE.

The National Labor Relations Board brought this ac-
on before the Court of Appeals for the Third Circuit for
nforcement of its order charging the International Long-
oremen's Association, Local 1566 with violating Section
8(b)(2) and 1(A) of the National Labor Relations Act, 29
. S. C. 151 et seq. by causing an employer, Maritime Ship
leaning & Maintenance Company to discriminate against
wo applicants for employment, Zack Page and Marvin
uhl because of their non-membership in the Local. The
oard did not bring any charge against the employer.

Maritime is engaged in the business of ship cleaning
nd maintenance in the Port of Philadelphia, and is a mem-
er of the Philadelphia Marine Trade Association, an
rganization of employers whose business operations are
onnected with the maritime industry in the Port of Phila-
lphia. The association negotiates and signs collective
argaining agreements on behalf of its members, including
aritime, with petitioner union as well as with other labor
rganizations whose members are involved in Maritime's
tivities in the Port of Philadelphia.

The collective bargaining agreements concerned in this
se were entered into between the Philadelphia Marine
rade Association and the International Longshoremen's
ssociation on May 12, 1954 and September 30, 1956. With
spect to the hiring procedures, the agreement contained
e following union security clause:

"Union Security: As to any and all work covered hereunder, finally determined by duly constituted public authority not to be subject to any statute forbidding a preferential hiring provision, the employers agree to give a preference to longshoremen who are members of the Union in good standing. As to all other work the employers agree to institute and maintain a Union

Shop as shall comply with Section 8(a)(3) of the National Labor Relations Act or any amendment thereto."

Hiring at Maritime is effected by means of the shape-up system. Men desiring employment report each day at Maritime's place of business where hiring foremen who are steady employees of Maritime select from the group reporting to the shape-up that number required to do the available work. These foremen are members of Local 1566.

The complainants, Zack Page and Marvin Gould, testified that when they appeared at Maritime's premises the foremen first engaged regular union members, known as "book men" and, secondly, the probationary members known as "card men", and finally the non-union men. Maritime's foremen and supervisors, on the other hand, testified that they hired stevedores for the company on the basis of the experience of the stevedores. They further testified that most of the experienced men were union men, and since the work involved was dangerous and required skilled labor, experienced men were required. The trial examiner determined that priority for employment was given according to union status, the applicants for employment falling into three categories: (1) book men, who were full fledged members of the union; (2) card men who were probationary members and who upon payment of dues each month were given a card. With 12 consecutive cards, and the compilation of 700 work hours on the waterfront, a card man becomes eligible for fulltime union membership. This, therefore, insures a certain amount of experience in longshore operations; and (3) those applicants who had neither books nor cards. Page and Gould were both card men.

On November 25, 1956, a waterfront strike occurred and both Page and Gould refused to do picket duty. The union, therefore, cancelled their status as card men. Both

complainants filed unfair labor charges on December 11, 1956, shortly after the strike terminated, alleging that they were refused employment following the strike. Both complainants, however, were unable to specify the dates on which they were refused employment, and the employer records disclosed that they worked continuously, starting with the very first day after the strike ended until quite sometime after the unfair labor charges were filed.

On these facts, the board concluded that the union, through its union member-foremen, caused discrimination in favor of union members and thereby violated Section 8(b)(2) and 10(A) of the Act. The Board also concluded that the union security provisions in the 1954 and 1957 contracts were invalid and the union had again violated Section 8(b)(2) and 10(A) of the Act by maintaining them in effect. The alleged invalidity of the union security clause was premised upon the Board's determination that the language which purported to defer the clause granting preference to union members could not be effected because the hiring practice, according to the Board, showed that the parties never really intended to postpone operation of the preferential system. The Board's contention in this regard was based solely on the fact that although the union security clause was valid on its face, it was to be regarded as an illegal arrangement between the employer and union only because of subsequent conduct of the foremen in the hiring practices above described.

There was no evidence whatsoever either from the charging parties or from any other source showing that the Union participated in any respect in the hiring of men. There was an abundance of evidence that the Union did not participate and that whatever the employer did, it did on its own and not in cooperation with or with the knowledge and consent of the Union.

The Board ordered the union to cease and desist from entering into or enforcing any agreement or practice of preferential hiring and also ordered the union to make

whole Gould and Page for any loss of pay resulting from the alleged discrimination; and further to refund to all employees of Maritime the initiation fees, dues and all other moneys unlawfully exacted from them as a price for their employment for the period beginning six months prior to the filing and service of the charges—the Brown-Olds remedy (*United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry, etc. and J. S. Brown—E. F. Olds Plumbing and Heating Corporation*, 115 NLRB 594).

The Court of Appeals affirmed the Board's order; however, as there was no evidence of coercion, the court refused to enforce the Brown-Olds aspect of the Board's order.

The National Labor Relations Board has applied for writ of certiorari, No. 285, October Term, 1960, as to the applicability of the Brown-Olds remedy.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Point One: The Decision of the Court Below Is in Direct Conflict With the Decisions of the Court of Appeals for the 7th Circuit in Lewis v. Quality Coal Corporation, 270 F. 2d 150; the Court of Appeals for the 2nd Circuit in NLRB v. News Syndicate Company, 46 LRRM 2295, — F. 2d —; the Court of Appeals for the District of Columbia in Honolulu Star Bulletin, Ltd. v. NLRB, 274 F. 2d 567; the United States District Court for the Middle District of Tennessee in Lewis v. Fentress, 160 F. Supp. 221 (1958), Which Hold That Deferral Language Contained in a Union Security Clause, Which Permits the Operation of That Clause to the Extent Allowed by Law, Qualifies the Express Terms of the Clause and Makes It Conform to Existing Law, and That a Collective Bargaining Agreement Which Is, Therefore, Valid on Its Face Cannot Be Converted Into an Illegal Hiring Agreement Because of Alleged Discriminatory Practices Subsequent to the Entry of the Agreement.

The allegedly invalid union security clause contained in the collective bargaining agreement between the union and Maritime reads as follows:

> "Union Security: As to any and all work covered hereunder, finally determined by duly constituted public authority not to be subject to any statute forbidding a preferential hiring provision, the employers agree to give a preference in longshoremen who are members of the Union in good standing. As to all other work the employers agree to institute and maintain a Union Shop as shall comply with Section 8(a)(3) of the National Labor Relations Act or any amendment thereto."

The Board found that the contract was illegal on its face, despite the deferral language therein. The invalidity of the clause was premised alternatively upon the Board's determination that the language which purported to defer the clause granting a preference to union members could not be given effect because it was thought to be insufficient to negate the illegal coercive force of the clause, and that as the parties had been following a "present practice" of work preference in employment to union members, the parties never really intended to postpone operation of the preference system. This decision of the Board, as affirmed by the Court of Appeals for the Third Circuit, is contrary to the holding of the Court of Appeals for the Seventh Circuit on the precise point in *Lewis v. Quality Coal Corp.*, 270 F. 2d 140 (1959); the Court of Appeals for the Second Circuit in *NLRB v. News Syndicate Co.*, 46 LRRM 2295, — F. 2d — (1960); the Court of Appeals for the District of Columbia in *Honolulu Star Bulletin v. NLRB*, 274 F. 2d 567 (1959); the United States District Court for the Middle District of Tennessee in *Lewis v. Fentress Coal & Coke Co.*, 160 F. Supp. 221 (1958); and the decision of this court in *NLRB v. Rockaway News Supply Company*, 345 U. S. 71 (1952).

Under the Wagner Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, the union and the employers were permitted to include in their collective bargaining agreements so-called "closed shop" provisions which required the employers to give preference to union members. This particular provision was modified by the Taft-Hartley Act, 29 U. S. C. 141-197, and in its place was substituted the so-called union security clause. Following the enactment of the Taft-Hartley Act, the labor unions anticipated that Congress might make a future amendment to the act and return to the closed shop provision or some modification of it. Accordingly, most labor unions, following the Taft-Hartley Act, have incorporated a provision into their collective bargaining agreements similar to the one in this case, intending that if the hoped-for legislation should be enacted, then the preferential hiring

system can be immediately invoked thereafter. This was the purpose of the language of the union security clause which is the subject matter at bar. The Board has attacked this union security clause heretofore in different circuits but the validity of this clause has been consistently upheld by the various courts which have ruled upon it.

In the case of *Lewis v. Quality Coal Corp.*, 270 F. 2d 140 (7 Cir., 1959), which entailed an action by trustees of a union welfare and retirement fund against the employer for moneys assertedly due the fund under the provisions of the collective bargaining agreements, the defense of the employer was that the agreement was invalid in view of its illegal union security clause. The clause in that case was as follows:

> ". . . It is further agreed that as a condition of employment all employees shall be, or become members of the United Mine Workers of America *to the extent and in the manner permitted by law.*" (Emphasis added.)

In reviewing the employer's contention, the Court of Appeals held the union security clause to be perfectly legal, and stated in this regard (p. 142):

> "Of course, without the portion italicized above the provisions of the agreement here under consideration would violate Sec. 158. Lewis v. Jackson & Squire, D. C., 86 F. Supp. 354. It would, without reservation or limitation as to time of joining, require union membership as a condition of employment. But the qualifying phrase 'to the extent and in the manner permitted by law' expressly modifies and limits the application of the clause relating to union membership so that any requirement it imposes is conditioned on conformity to existing or future law. The provision of the agreement relating to union membership is thus limited and qualified by its expressed terms so that it imposes no requirement as a condition of employment which would conflict with 29 U. S. C. A. Sec. 158(a)(3) or any other law."

In the case of *Lewis v. Fentress Coal & Coke Company*, 160 F. Supp. 221 (M. D., Tenn., 1958), affirmed 264 F. 2d 134 (6 Cir. 1959) wherein the same union security clause was involved as that involved in *Lewis v. Quality Coal Corp., supra*, the court ruled that the union membership provision did not violate a Tennessee statute prohibiting contracts making union membership a condition of employment, nor did it violate the National Labor Relations Act. Speaking in terms of "savings clauses" the court ruled that the collective bargaining agreement was perfectly valid. This opinion was affirmed by the Court of Appeals for the Sixth Circuit.

In the case of *Honolulu Star Bulletin Ltd. v. NLRB*, 274 F. 2d 567 (D. C. Cir., 1959), the Board found unlawful the following union security clause:

> "* * * It is understood and agreed that the general laws of the International Typographical Union, in effect January 1, 1956, *not in conflict with federal* and territorial (state) *law or this contract*, shall govern relations between the parties not specifically enumerated herein. * * * (Emphasis supplied by the court.)"

The court reversed the Board on the basis that the union security clause was not illegal, and stated in this regard (p. 569):

> "Section 24(c), as shown by the above quotation, clearly provided that the General Laws of the Union in conflict with either federal law or in the contract itself were not included in the contract. A closed-shop provision would have been in conflict with the federal law and also in conflict with Section 2(a) of the contract. Any such provision in the General Laws was excepted from inclusion in this contract. We do not see how language could have been clearer."

And, in the case of *NLRB v. News Syndicate Company*, 46 LRRM 2295, — F. 2d — (1960), where the Board also ruled in view of a contract similar to that at bar that the

contract was illegal on its face, the court stated (LRRM p. 2298):

> "But we find it necessary to go no further than to overrule the Board's holding on the reasoning and on the ground developed in Honolulu Star Bulletin v. N. L. R. B., supra. See also Lewis v. Quality Coal Corp., 7 Cir., 270 F. 2d 140, 44 LRRM 2704. The facts of the case here fall directly within the scope of the Honolulu Star case: the contract here contained no explicit illegal Union security clause and did not purport to incorporate illegal provisions of the General Laws, but only those which were 'not in conflict * * * with federal or state law * * *.'"

Finally, in *NLRB v. Rockaway News Supply Company*, 345 U. S. 71 (1952), a union member-employee had been discharged for refusal to cross another's picket line. He charged the employer with an unfair labor practice. The National Labor Relations Board held the employer guilty of the unfair labor practice and ruled that the no-strike provision contained in the collective bargaining contract between the employer and the employee's union, which barred employees from refusing to cross picket lines, was of no effect because of the failure of the union security portion of the contract to conform to the Labor Management Relations Act. There, as here, the Board ignored the "savings" aspect of the security clause. The court stated in this regard (pp. 78-79):

> "The features to which the Board rightly objects not only may be severed but are separated in the contract. The whole contract shows respect for the law and not defiance of it. The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; and

they proposed to go no farther, and that is their whole duty.

* * *

"The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common-law contract doctrine. It rests upon no decision of this or any other controlling judicial authority. We see no sound public policy served by it."

Apparently recognizing the inherent weakness of its original position, the Board buttressed the finding of the trial examiner by asserting as an alternative basis of invalidity that the finding of "present unfair labor practices" by the trial examiner created an inference that, despite the deferral language in the union security clause, the parties never really intended to postpone operation of the preference system, and thus the deferral language was ineffective. The Court of Appeals agreed with this finding of the Board stating:

"This decision was based on the finding that, since the parties immediately began implementing the preferential portion without regard to the deferral language, the clause was executed with the present intent to create discriminatory conditions of employment."

In the case of *Lewis v. Quality Coal Corp., supra*, this assertion of the Board was squarely met and refuted by the Seventh Circuit. That court stated in this regard (p. 143):

"The validity of the agreement is not affected by any conduct or practice of the parties which would constitute an unfair labor practice under 29 U. S. C. A. Sec. 158(a)(3). At most, such conduct or practice, not authorized by the agreement itself, would show that the Union and Quality violated applicable law. *It would not alter or change the terms of the agreement.*"

In *Lewis v. Fentress*, 160 F. Supp. 221 (D. C. Middle District Tenn., 1958), it was asserted, as it was by the Board

here, that a union-security clause which because of its deferral language was valid on its face, was rendered invalid by the subsequent actions of the contracting parties. The court refused to accept this obviously fallacious argument, and stated (p. 227):

> ". . . . At most the practice, not authorized by the contract itself, would show that the union and the company violated the applicable law. It would not alter or change the terms of the Agreement which, as above noted, provides in effect that neither a closed shop nor a union shop is required by the contract unless it is in conformity with the law of the state where the contract is to be performed. Neither does the Court regard the practice as in any wise relevant in determining the intention of the parties as to the meaning of the contract. For the contract itself is not ambiguous. As the Court construes its pertinent language, it plainly does not require membership in the union as a condition of employment in states having statutes making such a condition unlawful. It is axiomatic that the practical construction by the parties to a contract as shown by their conduct is not considered unless the contract itself is uncertain or ambiguous in meaning."

See also *Honolulu Star Bulletin v. NLRB, supra;*

It is, therefore, clear that the union security clause is perfectly legal and the actions of the employer through its agent foremen, if violative of the strictures set forth in the National Labor Relations Act, are at most conduct or practice not authorized by the agreement itself. Certainly, this clause cannot be used to impute an unfair labor practice to the union. If there is an unfair labor practice it must be judged by evidence relating specifically thereto and not by the union security clause which is valid on its face.

Point Two: The Decision of the Court Below Is in Direct Conflict With the Decisions of the Court of Appeals for the District of Columbia in Carpenters District Council v. NLRB, 274 F. 2d 564, and Honolulu Star Bulletin v. NLRB, 274 F. 2d 567; the Decision of the Court of Appeals for the Second Circuit in NLRB v. News Syndicate Company, 46 LRRM 2295, — F. 2d — (1960); and the Decision of the United States District Court for the Southern District of Indiana in Evans v. International Typographical Union, 81 F. Supp. 675, Which Hold That Mere Membership of Foremen in a Labor Organization Is Not a Sufficient Basis for a Determination of Union Participation in Improper Preferential Hiring by the Employer.

As an alternative theory, the Board concluded that the union violated Section 8(b)(2) and 1(A) of the Act by participating in the hiring practices at Maritime through the Maritime foremen, who were union members. The Board based its finding in this regard on Article XVI, Section 22, of the International Union Constitution, which states:

> "No button other than the regularly adopted and recognized I. L. A. working and dress button shall be recognized in the hiring of men for work. Any member violating this rule shall be fined in the sum of $25.00."

and upon the fact that the foremen's union membership "without more" was sufficient to impute their actions to the union. The court agreed with the Board's determination. In this regard the opinion of the Court of Appeals is in conflict with *NLRB v. News Syndicate Co., supra; Carpenters District Council v. NLRB*, 274 F. 2d 564 (D. C. Cir., 1959); *Honolulu Star Bulletin, Ltd. v. NLRB, supra; Evans v. International Typographical Union*, 81 F. Supp. 675 (S. D. Indiana, 1948), and with the evidence presented to the Board.

The record shows that the union played no part in the employment of their members by the company. They did not maintain a hiring hall, nor did the union supervise or participate in any manner in the employment of the men which took place at the office of Maritime. The testimony is clear that all hiring was done by the employer's foremen for the employer only. Each of the employer's foremen, who incidentally were called by the Board, testified that they hired according to their own discretion and there was absolutely no arrangment between them and the union in connection with the hiring of union men. The employer's superintendent testified that there was no understanding between the company and the union regarding the hiring of union men, and that there had never been coercion of the employer or superintendent to prefer union men (App. 7b).* Further, the superintendent stated that the employer hired non-union men in substantial numbers. In fact, non-union men were at times hired when union men were available (App. 7b). Further, he stated that he knows of no instance where a foreman was reprimanded or disciplined by the union for hiring non-union men (App. 7b).

Mr. Thesing, foreman for the employer, testified that there was no understanding on his part that the union men were to be preferred in the hiring (App. 12b), and that even in the face of complaints by union members because non-union men were being hired, there were no reprimands from the union and no pressure brought to bear to prefer union men (App. 13b). The other foremen testified similarly (App. 18b, 22b, 34-39b). The documentary evidence taken from the files of the employer association significantly support the foremen's testimony.

Both complainants Page and Gould worked more hours during the year in question than many union men. Gould in fact worked more than the minimum requirement and received vacation pay (despite the fact that he was a regu-

* Union's appendix in Court below.

lar employee of the Budd Company), while substantial numbers of union men fell short of the minimum requirement (N. T. 193, 338, 250-352, 354).

On behalf of the respondent union, the secretary-treasurer testified that the union did not participate in any manner in hiring practices and that there were no agreements or understandings between the union and the employer in this regard. He further stated that no foremen had ever been disciplined or reprimanded for hiring non-union personnel (App. 39-40b). Despite this uncontradicted testimony, the board found that the employer had engaged in a discriminatory practice and that the union participated therein. Its sole basis was the fact that the foremen were members of the union, and thus subject to the union constitution, which although ambiguous was determined by the Board to require foremen to recognize the I. L. A. working and dress button in the hiring of men for work. This finding of the Board was made, despite the fact that the Vice President of the International Union, Mr. James T. Moock, testified that he had made it clear to all local unions, including Local 1566, that they must not exert any pressure or require the employers to prefer union men (App. 42b). He explained that since *NLRB v. Jarka Corporation*, 198 F. 2d 618 (2 Cir., 1952), all locals were told that a non-union member has equal employment rights with those belonging to the union (App. 42-43b). The foremen involved in this case stated that they were unaware of the union constitutional provision and had never been governed by it (N. T. 301-302).

Putting to one side the very serious question as to whether or not the determination of the Board could withstand the tests set forth in *Universal Camera Corp. v. NLRB*, 340 U. S. 474, the decision of the court below is contrary to the great majority of cases decided by the various courts throughout the country.

In the case of *Carpenters District Council v. NLRB*, 274 F. 2d 564 (D. C. Cir., 1959), the Board found union

participation "upon the presumed effect of the foreman's obligation as a union member." The Court of Appeals refused to enforce the Board's order, and stated in this regard (p. 566):

> "This view rests upon our analysis of the congressional purpose in enacting Sec. 2(3) (and its companion provision, Section 14(a)) in 1947. Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidents its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their individual loyalty, in spite of any union obligations. See H. Rep. No. 245, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); L. A. Young Spring & Wire Corp. v. National Labor Relations Board, 1947, 82 U. S. App. D. C. 327, 163 F. 2d 905, cert. den. 1948, 333 U. S. 837, 68 S. Ct. 607, 92 L. Ed. 1121.
>
> "In the absence of any evidence to the contrary, we should assume that this employer preprogative has had the effect which Congress contemplated. Therefore, we are unable to uphold the Board's conclusion that the 'natural and foreseeable consequence' of Kamoske's statement to Adams was that Adams, because of his union obligations, would ignore his role as a representative of Miller and become merely a 'medium of transmission' of Kamoske's order to Miller's employees."

Further, in *Honolulu Star Bulletin, Ltd. v. NLRB*, 274 F. 2d 567 (D. C. Cir., 1959), the Board, without success, attempted precisely the same tack which they employed in the case at bar. In summary, the Board held that the union collective bargaining agreement incorporated a closed shop

provision which appeared in the general laws of the international union. The Board refused to give any effect to the deferral language employed in the union security clause. From this fallacious premise, the Board further reasoned that since the shop foremen were members of the union and had the power to hire and fire, and that they as members of the union were bound by the general laws of the union, the union was guilty of participating in any discriminatory hiring practices of the employer. The court initially struck down the Board's contention that the deferral language in the union security clause was ineffective, and then, adopting its reasoning and holding in *Carpenters District Council v. NLRB*, *supra*, found that the activities of the foremen who happened to be union members were not such as to create an inference of union participation.

In *NLRB v. News Syndicate Company*, 46 LRRM 2295, — F. 2d — (2 Cir., 1960), under facts similar to those at bar, the Court found that there was no presumption of law that a foreman would be guided by his union obligations rather than his obligations to his employer. The court noted that the foremen's prime allegiance and responsibility were owed to his employer, and the court was unable to discover any reasonable ground of support for the conclusion that the hiring conditions vested the union with control over the hiring.

In *Evans v. International Typographical Union*, 81 F. Supp. 675 (S. D. Indiana, 1948), a contempt proceeding was brought for violation of a temporary injunction pending the final determination by the National Labor Relations Board on the charge of unfair labor practice, a claim was presented that the defendant union since the issuance of the injunction has pursued a course of conduct which caused employers to discriminate against employees in regard to hiring on the basis of union membership. The Board claimed that the violation occurred from provisions in the contract requiring that the foremen be members of the International Union and

that foremen have exclusive jurisdiction over hiring, supervising and discharging employees. In this connection the General Counsel adverted to the oath in the constitution which binds all union members to give preference to other union members, stating that this was the device by which the respondents were participating in the discrimination contrary to the court's order. The court, in finding no union activity, adopted the observation made by the trial examiner in his intermediate report and stated (p. 684):

> "'A contractual undertaking that foremen be members of a union is not contrary to law unless the employer is restrained or coerced into agreeing to it. Normally, it is not to be inferred in the absence of other proof that the employment of union foremen operates, without more, to establish closed shop or preferential hiring conditions in violation of Section 8(a)(3).'"

In failing to find any participation on behalf of the union, the court commented, "The fact should not be overlooked that the foreman is selected by the employer and is the latter's subordinate."

It is clear, therefore, that the Board's finding that the union participated in any unfair labor practice, which is admittedly not supported by the record, cannot be sustained as a matter of law, in view of the overwhelming decisions to the contrary in the various circuits. No valid inference can be drawn against the union because of the union membership of the foremen.

CONCLUSION.

In the absence of evidence to prove union participation in an alleged unfair labor practice, the Board resorted to assumptions based solely on the union security clause and the union membership of the foremen. The same clause which has been held illegal by the Court below has been held valid by other Courts of Appeals. That clause will be found in

most collective bargaining agreements around the country, all of which will be vitally affected by the decision of the Court below. Moreover, it is also common practice for foremen to be members of the unions while representing the employers. The inference which the Board has drawn from this fact will likewise have the most serious and widespread repercussions.

Both inferences drawn by the Court below are in conflict with the decisions of other circuits. Under the circumstances it is essential that this Court grant certiorari and fix the rule for a uniform application of the law.

Respectfully submitted,

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MARVIN I. BARISH,
Counsel for Cross-Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,903

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued November 16, 1959

Before BIGGS, *Chief Judge* and GOODRICH and MCLAUGHLIN, *Circuit Judges.*

Opinion of the Court

(Filed May 4, 1960)

By MCLAUGHLIN, *Circuit Judge.*

The National Labor Relations Board (Board) seeks enforcement of its order, pursuant to Section 10(c) of the National Labor Relations Act (Act), 29 U. S. C. Section 151 et seq., against the respondent, Local 1566, International Longshoremen's Association (Union). The Board found that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing an employer, Maritime Ship Cleaning and

Maintenance Co. (Maritime) to discriminate against two applicants for employment, Marvin Gould and Zack Page, because of non-membership in the Union; by participating in a discriminatory hiring practice against non-member applicants; and by maintaining in effect, in the collective bargaining agreements of 1954 and 1957, unlawful union security clauses. The Trial Examiner held that the 1957 agreement only was unlawful for failure to comply with the filing requirements of Section 9(f), (g) and (h) of the Act, but the General Counsel contended and the Board found that both contracts were unlawful apart from any considerations of filing.

The Board ordered the Union to cease and desist from entering into or enforcing any agreement or practice of preferential hiring except as authorized by Section 8(a)(3) of the Act; from causing, or attempting to cause Maritime to refuse employment to Gould and Page, or any other applicant, for non-membership in the Union in violation of Section 8(a)(3); and from restraining or coercing in any other manner employees or applicants for employment in the exercise of their rights under Section 7 of the Act, except to the extent authorized by Section 8(a)(3). The Board also ordered the following affirmative action: To make whole Gould and Page for any loss of pay resulting from the discrimination and to refund to the employees of Maritime the initiation fees, dues and all other monies unlawfully exacted from them as a price for their employment, for the period beginning six months prior to the filing and service of the charges (commonly referred to as the "Brown-Olds Rule").

Hiring at Maritime is effected by means of the "shape up" system. Men desiring employment report each day at Maritime's place of business where hiring foremen, employees of Maritime and themselves union members, select from the group for whatever work is available on that day. The Trial Examiner determined, and the evidence so establishes, that priority for employment was given according

to union status. The applicants fell into three categories: (1) Book men, who were full fledged members of the union and who, upon payment of dues, received an identification button, differently colored for each month. (2) Card men, not members of the Union but who, upon payment of "dues" each month, were given a card. With twelve consecutive cards and compiling 700 work hours on the waterfront, a card man becomes eligible for full union membership. (3) Those applicants who had neither books nor cards. Priority was allocated according to these categories, book men receiving preference and upon exhausting these, card men and finally, if any jobs remained, the last class.

Gould and Page were card men, but in December 1956 the Union, through its Secretary Treasurer, refused to issue their cards (along with some 7 to 10 other men) because they had not picketed during a strike which occurred about mid November 1956. Subsequent to their bringing charges the parties were informed that the Union had rescinded its refusal to issue the cards. However, neither again sought them.

The Union resists enforcement of the Board's order on the grounds that any discriminatory hiring practices at Maritime were the unilateral action of Maritime's hiring foremen and there was insufficient evidence to support a finding that the Union participated therein; and the union security clause in the collective bargaining agreements was not unlawful since it was couched in terms of a "savings" or "deferral" clause. The Union also contests the Board's application of the "Brown Olds Rule" in its remedy.

The Union does not question, and we shall not consider, the finding that it was unauthorized to make a union security contract in 1957 for failure to comply with Section 9(f), (g) and (h) of the Act, nor the denial of its motion, at the hearing, for production of names and pre-hearing statements of witnesses.

This court has reviewed the whole record and concludes there is substantial evidence to support the Board's findings. Such findings therefore are conclusive and will not be dis-

turbed. Universal Camera Corp. v. Labor Board, 340 U. S. 474 (1951).

I

Union Participation

The hiring system was based upon the union status of the men shaping-up—that is whether they had buttons, cards or neither—and it was the Union who determined that status and either issued, or refused to issue, a button or a card. When some nine to twelve card-men, including the complainants Page and Gould, did not walk a picket line the Union refused to issue them cards. This action might have been meaningless as a disciplinary measure if the Union had not been completely aware that without a card, employment opportunity was greatly reduced under Maritime's hiring practices. The constitution of the International provides that only the regular ILA buttons "shall be recognized in the hiring of men for work" and provides a penalty for violations. The constitution was supplemented on the local level by the collective bargaining agreements calling for hiring preference for Union members.[1]

The sum of this is a clear indication of a Union policy or practice of preferential hiring. The Trial Examiner held:

> "* * * that where the circumstances disclose the establishment or imposition of a discriminatory hiring policy by or for a local union, that union may be held responsible where discrimination is a proximate and foreseeable consequence of the operation of the policy, and discrimination in fact results. This is not to impose upon the local responsibility for programs or conduct over which it has no control. It is merely to hold it accountable for its own action. If the local wishes to avoid liability in such situations there are effective methods by which it may disavow the offending policy."

1. The "deferral" clause of these agreements is discussed infra

At the hearing, the Union attempted to rebut this evidence with testimony that the hiring foremen were not aware of the clause in the International constitution. The Examiner did not credit this testimony since only one of the five foremen would so testify. Testimony that the local was orally advised by the International that the hiring clause in the constitution was not enforced and that locals, in any event, have blanket authority to ignore any provision in the constitution which they deem illegal was considered "incredible" by the Examiner in the teeth of evidence that other provisions are followed and enforced, particularly a specific method for dealing with the problem of illegal provisions. And the constitution itself declares null and void any local by-law in conflict with the constitution. The question of credibility of testimony is within the Trial Examiner's domain. "* * * it is not our task to resolve questions of credibility of those who testify at the Board hearings." National Labor Relations Board v. Local 420, etc., 239 F. 2d 327, 328 (3 Cir. 1956).

The Union attempts to meet the Examiner's finding by averring that union participation in unfair practices must be proved by direct evidence. We are of the opinion that this is erroneous. It is true that many of the cases cited by the Board in support of its position contain indisputable evidence that the offending union formally requested or demanded that the company follow a discriminatory hiring practice. See e.g. National Labor Relations Board v. Local 369, etc., 240 F. 2d 539 (3 Cir. 1956); National Labor Relations Board v. Local 420, etc., 239 F. 2d 327 (3 Cir. 1956). But these decisions do not establish a minimum standard for finding union participation. In fact in National Labor Relations Board v. Local 369, supra, at 544, this court stated: "The absence of proof that the Union specifically requested the Company to discriminate is not critical where there is substantial evidence to support the finding of a discriminatory hiring arrangement actively participated in by the

Union." The Board may, as it did here, draw a reasonable inference from the believable evidence. It must, of course, be supported by substantial evidence but an inference as such is not proscribed by the Act. This has been settled by Radio Officers v. Labor Board, 347 U. S. 17, 48-52 (1954). There, union participation was proved but the unfair practice, encouragement of union membership, was inferred by the Board. The Court, in upholding the Board said at page 52:

> "Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of a union, those employers must be presumed to have intended such encouragement. It follows that it was eminently reasonable for the Board to infer encouragement of union membership * * *."

Conversely, the unfair practice being proved, the Board may make a reasonable inference from all the evidence that the Union participated in such practice. "The unfair labor practice can be found from a procedure which shows a practice or understanding though it may not establish an express contract between the parties." National Labor Relations Board v. Local 420, supra at 330.

The Union's contention that direct evidence, rather than inference, is necessary to implicate it in the unfair practice is set at rest by the following language in Radio Officers, supra at 50:

> "There is nothing in the language of the amendments [Taft-Hartley] itself that suggests denial to the Board of power to draw reasonable inferences. It is inconceivable that the authors of the reports [House Reports on Taft-Hartley] intended such a result, for a fact-finding body must have some power to decide which inferences to draw and which to reject. We therefore conclude that insofar as the power to draw reasonable

inferences is concerned, Taft-Hartley did not alter prior law."

The testimony in this instance is sufficient to support the resulting inference of the Board. Whether this court would have arrived at the same result is of no matter. Our review is limited to the sufficiency of the supporting evidence. Universal Camera Corp. v. Labor Board, 340 U. S. supra, 488.

II

Union Security Clause

We turn now to the legality of the union security clause contained in the collective bargaining agreements between the Union and Maritime. It reads:

> "UNION SECURITY: As to any and all work covered hereunder, finally determined by duly constituted public authority, not to be subject to any statute forbidding a preferential hiring provision, the employers agree to give preference to men who are members of the Union in good standing. As to all other work, the employers agree to institute and maintain a union shop as shall comply with Section 8(a)(3) of the National Labor Relations Act or any amendment thereto."

The Board found that this clause, in both the 1954 and 1957 agreements, was illegal despite the deferral language therein. This decision was based on the finding that, since the parties immediately began implementing the preferential portion without regard to the deferral language, the clause was executed with the present intent to create discriminatory conditions of employment.

The Union counters that a collective bargaining agreement *valid on its face* cannot be converted into an illegal hiring clause because of *subsequent* discriminatory practices. This argument can be dismissed as not meeting the issue. The Board found that the agreement was *not valid in fact, from its very inception*. It cannot be seriously argued that

the mere recitation of words in a proper and accepted form can throw a blanket absolution over illegal acts presently performed under a clause, included in a contract, purportedly to cover a future possibility of legal sanction.

Finding as we do, it is unnecessary to discuss the issue whether the clause meets the requirement of "clear and unequivocal" set forth in Lewis v. Quality Coal Corp., 270 F. 2d 140 (7 Cir. 1959). However in passing, it should be pointed out that the clause involved, in both meaning and clarity, is a far cry from the one discussed in the Lewis opinion.

III

The Remedy

The sole remaining problem is the Board's application of the "Brown-Olds Rule." In a recent decision, National Labor Relations Board v. American Dredging Company, F. 2d (3 Cir. 1960), this court declined to enforce the rule against an employer who neither dominated the union nor collected the fees and dues. Further, there was no evidence in the record indicating that employees were required to join the union as a condition to obtaining employment. Requiring the employer in that situation to reimburse fees and dues paid to their union would be a windfall for the employees, and in no way effectuate the purposes of the Act. And in National Labor Relations Board v. United States Steel Corporation (American Bridge Division) and Local Union 542, AFL-CIO, F. 2d (3 Cir., 1960), we have continued to insist that the reimbursement order must be limited to employees shown to have been coerced. And we emphasize that in such alleged instances it is necessary to produce evidence of coercion as to each individual concerning whom it is asserted. Since the record before us furnishes no proof of that type we are forced to refuse the part of the Board's order allowing reimbursement to employees for fees and dues they had paid. Regarding Marvin Gould and

Zack Page, they are to be made whole for any loss of pay incurred by them as a result of the discrimination against them above stated.

The Board's order will be enforced except as to Paragraph 2(a) thereof which will be stricken.

The notice called for by Paragraph (c) of the Order will be amended by striking out its last paragraph. A decree in accordance with this opinion may be submitted.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,903

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, RESPONDENT.

Decree Enforcing in Part and Denying in Part an Order of the National Labor Relations Board

Before: BIGGS, *Chief Judge* and GOODRICH and MCLAUGHLIN, *Circuit Judges*.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated January 16, 1959. The Court heard argument of respective counsel on November 16, 1959, and has considered the briefs and transcript of record filed in this cause. On May 4, 1960, the Court being fully advised in the premises handed down its opinion enforcing in part and setting aside in part, the Board's said Order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Third Circuit that Respondent Local 1566, International Longshoremen's Association, its officers, representatives, agents, successors and assigns shall

1. Cease and Desist from:

(a) Giving effect to, entering into, renewing, maintaining, or enforcing any agreement, arrangement, understanding

ing or practice with Philadelphia Marine Trade Association, Maritime Ship Cleaning and Maintenance Co., or any other member employer of Philadelphia Marine Trade Association, requiring employees or applicants for employment, to be or become members of, or to obtain clearance or approval from, the Respondent Union as a condition of employment except as authorized by Section 8(a)(3) of the National Labor Relations Act (hereinafter called the Act).

(b) Causing or attempting to cause Maritime Ship Cleaning and Maintenance Co., to refuse employment to Marvin Gould and Zack Page because they are not members of, or have not secured clearance or approval from, the Respondent Union in violation of Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act.

(a) Make whole Marvin Gould and Zack Page for any loss of pay incurred as a result of the discrimination against them in the manner set forth in the section of the Trial Examiner's Intermediate Report dated January 16, 1958 entitled "The remedy."

(b) Post at its offices in Philadelphia, Pennsylvania, and all other places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix." Copies of said notice to be furnished by the Regional Director for the Fourth Region (Philadelphia, Pennsylvania) shall, after being duly signed by representatives of the Respondent, be posted immediately upon receipt thereof and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the aforesaid Regional Director signed copies of the notice marked "Appendix" for posting by Maritime Ship Cleaning and Maintenance Co., the employer willing, in places where notices to employees and prospective employees are customarily posted.

(d) Notify the said Regional Director in writing within ten (10) days from the date of this Decree what steps the Respondent has taken to comply therewith.

By THE COURT.

(S) McLAUGHLIN,
Circuit Judge.

DATED: June 14, 1960.

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JAMES R. BROWNING, Clerk

No. 401

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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NATIONAL LABOR RELATIONS BOARD

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The Board has filed a petition for certiorari to review the decision of the Court of Appeals in this case insofar as it denies enforcement of the reimbursement provisions of the remedy prescribed by the Board for the hiring arrangement which it and the Court found to be illegal. *National Labor Relations Board* v. *Local 1566, International Longshoremen's Association*, No. 285, this Term. That petition was filed to preserve the Board's position that it possesses authority to prescribe such remedy for an illegal

hiring arrangement, pending a resolution of the question in *Local 60, United Brotherhood of Carpenters* v. *National Labor Relations Board*, and *National Labor Relations Board* v. *Local 357, International Brotherhood of Teamsters*, Nos. 68 and 85, this Term, certiorari granted June 27, 1960. The instant cross-petition seeks to obtain review of the Board's unfair labor practice findings which were sustained by the court below.

We submit that the cross-petition should be denied. The issues presented therein are wholly evidentiary. Since the court below has found that the Board's findings are supported by substantial evidence, there is no occasion for further review.

The cross-petition presents, in substance, two questions: (1) whether there is substantial evidence to support the Board's finding that, despite the "deferral clause" in the contracts purporting to postpone operation of the illegal preference system specified therein, the Company and the Union intended to, and did, place it in effect immediately; and (2) whether there is substantial evidence to support the Board's finding that the Union was responsible for the discriminatory hiring practices engaged in by the union-member foremen. The facts of record, as summarized in the Board's petition in No. 285, pp. 4-7, and detailed in the opinion of the Court of Appeals (Cross-pet. 2a-7a), furnish adequate support for both of these findings.

In brief, the record shows that the hiring of longshoremen was effected through the "shape-up" system whereby the selection of those to be hired was exclu-

sively within the authority of the foremen; that in making their selection the foremen gave first preference to union-member "bookmen" and second preference to union-approved "card-men"; that such preference in hiring was established as a policy by the Union constitution which the foremen, as union members, were obligated under penalty of discipline to obey; and that it was also provided for in the union security clauses of the 1954 and 1957 contracts, although ostensibly deferred pending a ruling on their legality. On these facts, the Board was amply justified in finding that, despite the deferral clause, the union-security clauses in the contracts were executed with the present intent to create discriminatory conditions of employment in accord with established Union policy, and that the Union was chargeable with the discrimination practiced by its member-foremen.[1]

In view of the factual findings, sustained by the court below, that the union-security provisions of the contract were actually put into effect in an illegal manner, this case does not present the issue involved in the *News Syndicate*, No. 339, this Term, and related cases cited in the cross-petition (pp. 9-15) of whether a general savings clause is sufficient to apprise the employees whether or not an illegal union-

[1] The Board also found that the union security clause of the 1957 contract was independently unlawful, in that the Union had not complied with the filing requirements of the Act at the time the agreement was executed (Pet. in No. 285, p. 8). That finding alone, which petitioner does not here challenge, would be sufficient to support virtually all of the Board's order in this case.

FILE C

security provision is incorporated in the contract. Similarly, in view of the evidence that the foremen in fact carried out the Union's discriminatory policy, no question is presented (Cross-Pet. 16-21) as to the propriety of inferring discrimination, or of holding the Union responsible therefor, merely on the basis of the foreman's union membership.

For these reasons, the cross-petition for certiorari should be denied.

Respectfully submitted.

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October 1960.

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